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In the Supreme Court of the United States

BELINDA DUPUY, *ET AL.*, PETITIONERS,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MARY ELLEN MARGARET WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

*Counsel of Record

Counsel for Respondent

QUESTION PRESENTED

Petitioners, a class of alleged perpetrators of child abuse or neglect, claimed that Illinois Department of Children and Family Services' child welfare investigators violate their substantive and procedural due process rights by coercing their agreement to "safety plans," *i.e.*, limitations on contact with their children pending the investigation. As relief, the Class sought an injunction against safety plans "in any form."

The question this case presents is:

Whether the Seventh Circuit correctly held that the Class failed to show evidence of systematic coercion necessary to establish a due process claim on behalf of all class members.

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BRIEF IN OPPOSITION

The Class and its amici seek review in this Court on the flawed premise that the Seventh Circuit rejected a "totality of the circumstances" approach to voluntariness and held that all safety plans are voluntary. But this ignores the case's procedural posture as a class action and misstates the decisions below. In fact, the Seventh Circuit invited the Class to demonstrate coercion not only by misrepresentations but by any "other improper means." Pet. 19a. The court acknowledged that individual facts — such as a parent's "lack [of] education" or "low intelligence" — may bear on the "voluntariness" inquiry (Pet. 3a), but the Class simply could not prove such facts on a class-wide basis. The Class conceded that it could not establish systemic misrepresentations by investigators, and the Seventh Circuit rejected its attempt to rely on factors that applied only to "some of the class members," for "a plaintiff obviously cannot obtain class-wide relief for harms suffered by only some of its members." Pet. 3a.

In short, the Class needed to show systemic, class-wide coercion, and it failed to do so. Accordingly, there is nothing to its repeated charge that the Seventh Circuit erred in holding that all safety plans are voluntary, or that this case presents the Court with an opportunity to reject that position. *See, e.g.*, Pet. 11, 13, 14, 15, 16, 19, 20. It was the Class's burden to present sufficient evidence to bridge the gap between an individual claim of coercion and its claim that all safety plans are *un*constitutional. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982). But

the Class failed to do this below (and does not claim to be able to do so now), and the Seventh Circuit reached the unremarkable holding that relief was unavailable absent such class-wide evidence. *See* Pet. 3a. That holding does not warrant this Court's review.

The petition also omits critical aspects of Illinois procedure. First, if a parent does not agree to accept a safety plan, and an investigator removes the child, the parent is entitled to a judicial hearing within two working days, at which point the Department must meet its burden of proof for removal. Second, parents can always stop complying with the plan. One of the class members testified below that she simply refused to continue following it, and she suffered no adverse consequences. Pet. 57a. At most, a parent's refusal to follow a safety plan takes the parties back to square one — the investigator must determine whether there is evidence sufficient to satisfy the statutory requirement for removal and, if the child is removed, then the parent receives a hearing within two working days. Unlike a safety plan, a plea agreement does not permit criminal defendants to walk out of prison and demand a trial whenever they like.

Accordingly, there is no conflict between the Seventh Circuit's decision and either this Court's case law or the Third Circuit's decision in *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The Seventh Circuit invited the Class to marshal whatever evidence of class-wide coercion it could on remand, consistent with the "totality of the circumstances" inquiry that the Class espouses based on this Court's decisions. And as the Seventh Circuit itself recognized, *Croft* is easily

distinguished, for the investigator in that case (which involved an individual plaintiff, not a class): (1) had received only an anonymous, sixth-level hearsay allegation of abuse, and (2) had formed no opinion about whether abuse had occurred. *Id.* at 1126-27 & n.5. Here, the Class failed to present evidence that investigators invariably lacked any evidence of abuse when offering a safety plan, or that investigators (like the investigator in *Croft*) systematically lacked sufficient evidence to create reasonable suspicion of abuse when threatening to remove a child to obtain agreement to safety plans. Indeed, if further evidence that there is no split were needed, the Seventh Circuit itself has struck down conduct like that in *Croft* as unconstitutional. *See Doe v. Heck*, 327 F.3d 492, 524-25 (7th Cir. 2003).

In sum, the Seventh Circuit neither upheld all safety plans as constitutional, nor did it reject a "totality of the circumstances" test for constitutional voluntariness. It concluded that the Class had no class-wide evidence of coercion, and it properly distinguished the investigator's baseless threat in *Croft*. This case presents no issues warranting this Court's review, and its status as a class action makes it an extremely poor vehicle for answering the questions set out in the petition, even if they were fairly presented by the facts or decisions below (and they are not). Finally, as the district court recognized, the Department procedures to which class members testified below have been amended (*see infra* p. 8), meaning much of the factual evidence on which the district court relied is no longer meaningful, for the only relevant practices are the Department's current ones in a case seeking only injunctive relief.

For all these reasons, this Court should deny the petition.

STATEMENT

1. In 2006, approximately 905,000 children nationwide were victims of abuse or neglect, and maltreatment is the leading cause of death and injury among children. www.cdc.gov/od/oc/media/transcripts/2008/t080403.htm; see also www.cdc.gov/mmwr/preview/mmwrhtml/mm5713a2.htm. Respondent is the Director of the Illinois Department of Children and Family Services, which is charged with investigating reports of child abuse and neglect. 325 ILCS 5/2 (2006). Up to 100 children die of abuse in Illinois annually. Tr. 2294.

Although the Class indicates otherwise, only a "small number" of Hotline reports are anonymous; approximately two-thirds come from mandated reporters, *e.g.*, medical professionals and teachers, who report a child's statement or visible injuries. Tr. 2213-14. And only 65,000 of the approximately 350,000 reports received annually are even investigated; reports based on "very long chains of hearsay" and the like are not. Pet. 31a, Tr. 2227. Approximately 37% of investigations are resolved within 10 days, and 60% are resolved within 30 days. Tr. 2255. No more than 10%, and perhaps as few as 2%, of investigations involve safety plans, and only 5% of the plans involve temporary relocation of a family member. Tr. 3000-01.

After several children were seriously injured or killed in the early 1990s shortly after the Department became involved in their cases, the Illinois legislature mandated implementation of a risk assessment

standard. Pet. 33a. Accordingly, the Department formed a multidisciplinary committee of external experts to develop the Child Endangerment Risk Assessment Protocol (CERAP), which "quickly assess[es] the potential for moderate to severe harm immediately or in the near future" to permit investigators to "tak[e] quick action to protect children." Pet. 33a-34a. The child is to be seen and interviewed within 24 hours of the report, if not earlier (89 Ill. Admin. Code § 300.100(c)), and the CERAP is to be completed within 48 hours of a report (Pet. 34a). Studies show that recurrence of abuse dropped 40% five years after the CERAP was instituted. Tr. 2245, 2792, 2295, 2427.

Using the CERAP, an investigator first determines if any enumerated risk factor[1] or other cause for concern exists, using all available information, including the initial report, observing and talking with the child and household members, observing the home environment, the child's age and developmental status, the mental, medical, and developmental status of the parent(s) or other person(s) responsible for the child's safety, the type, severity, location, and extent of any injury to the child, and the intent, severity, and duration of behaviors directed toward the child. Pet. 36a-38a. A factor is deemed to exist only when there is "clear evidence or other cause for concern" about that factor, and the existence of any one factor, standing alone, does not mean a child is unsafe. Pet. 36a-37a.

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[1] Enumerated factors include, for example, "reasonable cause to suspect that a member of the household caused moderate to severe harm to the child or made a plausible threat" thereof. Pet. 35a n.1.

If no factor exists, the process ends; otherwise, the investigator determines if the factor may be partially or fully controlled by mitigating circumstances. Pet. 38a. If a factor is controlled, the child must be deemed "safe," *i.e.*, not likely to be in immediate danger of moderate to severe harm. Pet. 39a.

If the child is deemed "unsafe," however, an investigator has only two ways to avoid the immediate risk of harm: remove the child, or develop and obtain agreement to a safety plan. Pet. 39a. A safety plan's terms depend on the circumstances, but it must be as minimally disruptive to the child and family as possible, minimize separation issues for family members, and rely on resources that are "immediately and realistically available" to the family. Pet. 40a-41a (internal quotations omitted), 46a. If a parent refuses a safety plan, the investigator must reassess the situation and consider removing the child and/or referral to the State's Attorney's office for a court order.[2] Pet. 40a-43a. If the child is removed, a hearing must be held within two working days, and the child must be returned if the Department fails to meet its evidentiary burden. 705 ILCS 405/2-9(1) (2006).

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[2] An investigator may remove a child (with prior approval, unless an emergency exists) when there is "reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety" and there is no time to obtain a court order. 325 ILCS 5/5 (2006). The other alternatives are to petition for adjudication of wardship or to open a juvenile court case. Pet. 50a-52a. The Class did not challenge these procedures.

The safety plan form itself states that the person signing it (the parent or other person responsible for implementing it) understands that it is voluntary and that "[w]e understand that failure to agree to the plan or to carry out the plan *may* result in a reassessment of my home and *possible* protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home. I will then have the opportunity to plead my case in court." Pet.42a-43a (emphases added). The form also states that the signatory discussed the safety plan with the investigator and understands its contents. Pet. 42a. It states what will be done to protect the child, who is responsible for implementing action, and how it will be monitored. Pet. 41a. It also must state a time frame for implementation and continued monitoring, as well as the conditions under which it will be terminated and an estimated time frame therefor. Pet. 41a, 46a. In addition, it must contain a contingency plan if the primary safety plan is no longer needed. Pet. 41a. A copy of the form, which provides telephone numbers for the investigator and her supervisor, must be given to the family. Pet. 44a, 42a.

The investigator must inform the family that its cooperation with a plan is voluntary and, if possible, enlist the family's participation in its development, and then explain the plan (and the potential consequences of refusal) to the family. Pet. 40a-43a. The investigator must give the family information about the potential consequences if the plan is refused or violated and also must sign the form, stating that s/he discussed it and the consequences of non-compliance with the person(s) signing it, who agreed to comply with it. Pet. 42a-43a.

A plan must be approved by the investigator's supervisor, and since March 2002, a Department manager must approve any plan that includes relocation of family members, taking into account whether (1) the child is genuinely unsafe; (2) the plan will adequately protect the child(ren) in a way that is minimally disruptive to all family members; and (3) there is a reasonable and timely potential resolution to the safety plan. Pet. 41a-42a. The manager also must track the case to assure timely and appropriate resolution under Department procedures. Pet. 42a.

After a safety plan is in place, a family may ask that it be modified, and an investigator may modify it. Pet. 49a. Since August 2002, moreover, when Department procedures were amended (*after* the events to which the witnesses in the district court testified), Department personnel must inform parents that "'cooperation with the plan is voluntary,'" the family must receive "'information about the potential consequences if the plan is refused or violated,'" where possible the Department must enlist "'the family's participation in the development of the plan,'" which must be "'minimally disruptive,'" all plans must "'specify the conditions under which the plan is to be terminated and an estimated time frame within which this can be expected to occur,'" the Department must reassess the plan every five working days, and the family must be notified when the plan ends. Pet. 42a-49a.

The Department also must provide support services, including counseling or referrals to therapy, for parents or children in need of such services. Pet. 52a.

2. The instant action was commenced in 1997 as a class action, and petitioners are a subclass (the Class), ultimately defined as alleged perpetrators of child abuse or neglect "required by [the Department], under threat of protective custody [of their child(ren)], to adhere to and/or carry out" a safety plan. Doc. 531 at 8. The Class alleged that a safety plan offer, standing alone deprived them of the right to family autonomy (and thus required a hearing), as did any threat to remove a child to gain agreement to a safety plan; they sought an injunction against safety plans "in any form." Pet. 92a & n.23, 30a.

The district court conducted a 22-day evidentiary hearing on the Class's motion for a preliminary injunction. Pet. 53a. To support its claim that all safety plans are unconstitutional, the Class presented testimony from only a few class members, many of whom complied with safety plans while represented by counsel. Pet. 53a-70a.

A child in Theresa C's day care center required emergency surgery for a skull fracture that the attending physician concluded was "highly unlikely" to have been caused by a fall, as Ms. C. claimed. Pet. 55a-56a. Ms. C. agreed to suspend her day care center operation in light of her upcoming planned vacation. Pet. 56a. She signed a safety plan without reading it, although she stopped complying with it two weeks later. Tr. 560; Pet. 57a.

After Mr. DeLaFont was reported to have inappropriately touched a child at the day care center where he and his wife worked, his wife initially refused

to agree that he had to leave the home and said she planned to contact an attorney instead.[3] Pet. 58a.

After a report that James Redlin sexually abused his mildly autistic son on a train, he and his wife retained counsel, but Ms. Redlin agreed that her husband would not act as an independent caretaker for any children until the report was resolved, and the attorney advised the Redlins to continue following the safety plan after unofficial notice that the report would be unfounded. Pet. 54a-55a.

Jimmy Parikh reportedly kissed an eleven-year-old girl his wife was babysitting, and the couple retained counsel, who recommended that they continue following the safety plan until it was officially lifted. Pet. 63a.

A mother stopped her son, E.D., from speaking to an investigator when he "began to say something which very clearly indicated that he was acknowledging some sort of guilt, some degree of guilt in the allegation," saying they had contacted an attorney. Pet. 70a. The safety plan, which originally provided that E.D. remain away from home until he completed a juvenile sex offender evaluation and any recommended treatment, was later modified with the attorney's approval. Pet. 70a.

An investigator visited Debra C. after a report that her four minor children were at risk of harm because

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[3] The DeLaFonts filed suit against (among others) the investigator and her supervisor, but the jury returned a verdict for the defendants. *DeLaFont v. Beckelman*, No. 02-5448 (N.D. Ill., Dec. 1, 2005).

two of her children had died of sudden infant death syndrome years earlier, and after the non-custodial father kept the children (who were staying with their maternal grandparents under a safety plan), she retained counsel. Pet. 66a. The Department offered her support services, such as a drug and alcohol assessment and a bonding assessment, but she refused, stating she would accept only a babysitter and a maid. Pet. 66a.

When a neighbor provided an eyewitness report that Dr. S sexually abused his 8-year-old adopted daughter, the parents refused to allow an investigator to interview the child and promptly retained counsel. Pet. 68a; Tr. 338-51.

The Class presented no evidence that any class member (or any attorney therefor) (1) questioned a plan's terms; (2) requested different terms that were refused; or (3) requested the CERAP form or information about the abuse allegation but was denied.

The district court concluded that the Class was "entitled to injunctive relief, but decline[d] to categorically enjoin safety plans," and it instructed the Department "to develop constitutionally adequate procedures consistent with" its decision within 60 days. Pet. 101a. It rejected the Class's argument that the safety plan form's language "by itself constitute[s] a threat of actual removal, as it merely notifies Plaintiffs of what 'may' or 'possibl[y]' will happen should a family choose to reject a plan," adding that the form expressly states that agreement is voluntary. Pet. 92a. The court later entered a preliminary injunction, accepting (with modifications) the Department's proposed revised procedures, which included review of a safety plan

upon request and a new brochure for parents. Pet. 24a-28a; see also Resp. 1a (current brochure).

3. Still dissatisfied, the Class appealed, but the Seventh Circuit affirmed, noting that "when a child's safety is threatened, that is justification enough for action first and hearing afterward." Pet. 17a-19a, 12a (internal quotation marks omitted).

Addressing the Class's substantive due process claim, the court held that class-wide injunctive relief required evidence that the Department "really does coerce agreement to its safety plans wrongfully by misrepresentations *or other improper means*." Pet. 19a (emphasis added). In doing so, the court distinguished *Croft*, where the evidence demonstrated that the investigator threatened removal based on evidence that was insufficient for removal, whereas the Class had failed to present evidence of any such class-wide practice here. Pet. 18a.

Like the district court, the Seventh Circuit also rejected the Class's procedural due process argument that a mere safety plan offer, standing alone, is unconstitutionally coercive, observing that the form merely "informs the parents of the *possibility* that the child will be removed [if the plan is refused] — information that is in the nature of a truism." Pet. 18a-19a (emphasis in original). The Seventh Circuit analogized a safety plan offer to a civil settlement offer, explaining that "it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration." Pet. 17a (internal quotations omitted). A safety plan offer, standing alone, does not deprive parents of the right to family autonomy, the court reasoned, because parents

have the unilateral right to reject the offer and the Class's evidence did not suggest that safety plan offers are systemically made without any suspicion of abuse or neglect. Pet. 13a-17a. Because a safety plan offer, standing alone, does not deprive parents of their rights, the court continued, no hearing is required for that offer. Pet. 14a.

4. In response to respondent's motion for summary judgment, and notwithstanding the Seventh Circuit's explicit recognition that coercion could be demonstrated with evidence of "other improper means" of coercion (Pet. 19a), the Class insisted the Seventh Circuit recognized only "one narrow circumstance under which it would deem a safety plan to have been wrongfully coerced": knowing misrepresentation of facts or law to obtain agreement to a safety plan (Doc. 941 at 5-6, 11, 18, 23, & n.2). Because the Class conceded that it had no such evidence, and made no attempt to present evidence of class-wide coercion by other improper means, as the Seventh Circuit had invited, the district court granted respondent's motion. Pet. 21a-23a.

5. The Class appealed, and the Seventh Circuit summarily affirmed. Pet. 1a-6a. The court found significant that the Class had not retracted its concession that it had no class-wide evidence of misrepresentation or of any other means of unlawful coercion. Pet. 3a. Although recognizing that lack of education or low intelligence may justify a finding of coercion for a particular class member, the court rejected the Class's argument that harm to some class members could support class-wide relief under Civil Rule 23. Pet. 3a.

The Class's petition for rehearing en banc was denied without a single dissenting vote. Pet. 102a.

REASONS FOR DENYING THE PETITION

The Class urges review based on purported conflicts between the Seventh Circuit's decision and (1) one readily distinguished circuit court decision (Pet. 14-16), and (2) this Court's precedents on parental rights (Pet. 16-19) and voluntariness (Pet. 19-25). In addition, the Class urges review on the timing of any hearing, an issue the Seventh Circuit did not reach, based on that court's purported misunderstanding of the Class's argument and a claimed conflict with this Court's procedural due process jurisprudence. Pet. 26-28. The Class is wrong on all counts.

The very premise of the petition — that the Seventh Circuit held that all safety plans are always voluntary as a matter of law — is incorrect. The Seventh Circuit merely rejected, for lack of class-wide evidentiary support, the Class's claim that all safety plans are coerced and thus *per se* unconstitutional. This decision is consistent with *Croft*'s holding that the investigator's threat to remove a child if the accused father did not leave was a substantive due process violation, but because it was based on a "total absence of objective evidence" of abuse and the investigator's admission that she had formed no opinion about whether abuse had occurred. And when presented with *Croft*-like evidence in a different case, the Seventh Circuit reached a decision like the Third Circuit's in *Croft*. And it is the Class's claim of *per se* coercion, not the Seventh Circuit's decision, that would conflict with this Court's totality-of-the-circumstances, case-by-case analysis for voluntariness. Indeed, the

Class's inability to present evidence of class-wide "improper means" of coercion handily illustrates why a class action is a poor vehicle for this coercion claim.

Likewise, the Seventh Circuit's holding on the Class's procedural due process claim — that the Class failed to show that a safety plan offer, standing alone, deprives parents of their right to family autonomy (and thus requires a hearing) — is fully consistent with the Court's precedents on parental rights. Furthermore, Illinois law already provides several procedural vehicles for challenging any deprivation of parental rights, which were available to class members (and their often-promptly-retained counsel). Lastly, the Class fails to explain why post-2001 amendments to the safety plan form, and to Department procedures and policies, have not mooted most of its claims.

At bottom, the Class and its amici merely challenge the Seventh Circuit's application of settled constitutional principles to an evidentiary record devoid of the class-wide evidence needed to support class-wide relief. Certiorari should be denied.

I. As the Seventh Circuit Recognized, Its Holding That the Class Failed to Present Class-Wide Evidence of Improper Means to Coerce Agreement to Safety Plans Is Fully Consistent With *Croft*.

Selectively quoting the Seventh Circuit's opinion, the Class and their amici insist repeatedly that the court held that "all 'safety plan[s are] voluntary'" (*see, e.g.*, Pet. 11, 13, 14, 15, 16, 19, 20), and then argue that this purported holding conflicts with a single appellate court decision. This alleged conflict, however, relies

upon mischaracterizations of the Seventh Circuit's opinion, the evidentiary record, and *Croft*. The Seventh Circuit held only, and unremarkably, that class-wide relief was unavailable without class-wide evidence of "improper means" of coercion, which the Class did not have. Pet. 12a-19a.[4] The court properly distinguished *Croft* on the ground that the threat there was "not grounded in proper legal authority" because the investigator claimed that she definitely would remove the child when she actually lacked any evidentiary basis for removal. Pet. 18a.

Thus, *Croft* held that an investigator who threatened to remove a child that very night unless the father left the home violated the parents' substantive due process rights, but *not* on the grounds that all threats of removal are unconstitutional or that every safety plan offer, standing alone, requires reasonable suspicion of abuse, as the Class contends. Pet. 14-16. Rather, *Croft* held that the investigator's threat was unconstitutional because it was based on a "total absence of objective evidence," *i.e.*, a "six-fold hearsay report by an anonymous informant," which the parents denied, *and* the investigator candidly admitted that she lacked enough information even to form an opinion about whether abuse had occurred. 103 F.3d at 1126-27 & n.5. Were there any doubt about *Croft*'s narrow

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[4] The petition does not challenge the Seventh Circuit's conclusion that the Class was limited to evidentiary points it could establish on a class-wide basis. Indeed, this is well-established law. 7AA Wright, Miller, & Kane, *Fed. Practice & Procedure: Civil 3d* § 1775, at 41 (3d ed. 2005).

reasoning, the Third Circuit itself later clarified that the threat in *Croft* was unconstitutional because it was "without any valid basis." *Miller v. City of Philadelphia*, 174 F.3d 368, 376 (3d Cir. 1999). In short, the investigator in effect removed the father from the home by implying that she could do so when in fact she lacked *any* suspicion, much less a reasonable one, of abuse.

Accordingly, *Croft*, as clarified by *Miller*, and the Seventh Circuit's decision are easily harmonized. Both courts agree that the threat in *Croft* was unconstitutional because it was "without any valid basis" (*id.* at 376) and "not grounded in proper legal authority" (Pet. 18a). Indeed, when presented with facts like those in *Croft* — a threat of removal with "no reason whatsoever" to suspect parents of abuse — the Seventh Circuit reached precisely the same conclusion. *Doe*, 327 F.3d at 524-25 (holding that threat to remove child if parents did not call investigator within 24 hours was unconstitutional).

The Class, however, insists that the Seventh Circuit's decision is inconsistent with *Croft* because the record is "replete" with evidence of threats to remove children unless a safety plan is accepted, threats they claim are "indistinguishable" from the threat in *Croft*. Pet. 16. But *Croft* did *not* hold that every threat of removal is unconstitutional. It held only that threatening actually to remove a child is unconstitutional *when the investigator lacks reasonable suspicion of abuse*. Here, unlike the parents in *Croft*, who presented evidence that the investigator relied on sixth-level hearsay and admitted she had no opinion about whether abuse had occurred when she made the

threat, the Class conceded it could not show systemic misrepresentation by investigators, and presented no evidence that investigators threaten immediate and certain removal, class-wide, despite "a total absence of objective evidence" and despite not having formed any opinion about whether abuse has occurred.

Indeed, the anecdotal evidence offered in the district court is that investigators often had objective evidence of abuse, *e.g.*, a doctor's opinion that the witness's description of a child's fall was "highly unlikely," a child victim's own credible statement of sexual touching, a neighbor's eyewitness account of sexual penetration, and an alleged perpetrator's own indication that he molested the child. *See, e.g.*, Pet. App. 56a, 59a, 67a, 69a. Some witnesses also testified that they were given time, sometimes days, to consult an attorney, or that their attorney did not object to the safety plan. *See, e.g.*, Pet. 54a, 58a. On this record, the Seventh Circuit's rejection of the claim for class-wide injunctive relief is fully consistent with *Croft*, for the Class lacked class-wide evidence that investigators actually threaten to remove a child without sufficient evidence to do so.

The Class also insists that *Croft*'s requirement of "objective evidence creating reasonable suspicion" of abuse to threaten certain removal conflicts with the Seventh Circuit's decision that "reasonable suspicion" is not required for a safety plan offer, standing alone. Pet. 14-16; Homeless 9 & n.3. But *Croft* merely held that reasonable suspicion was required for the threat of certain removal because that threat (as opposed to the consent form's truthful statement that removal "may" occur) imposed the same "degree of interference with the [parents'] rights" as removal itself and thus

had to be supported by the same quantum of evidence that removal requires. 103 F.3d 1126. *Croft* cannot be read, as the Class does (Pet. 15), to hold that the mere offer of a safety plan, standing alone and without threat of the child's certain removal, poses the same degree of interference with parental rights as actual (or threatened) removal and thus requires reasonable suspicion of abuse. There is no conflict on this point between *Croft* and the Seventh Circuit's decision.

In sum, the Seventh Circuit, both here and in *Doe*, agrees with *Croft*'s holding that threatening actually to remove a child without sufficient evidence to do so violates substantive due process rights, and given the lack of any class-wide evidence of investigators threatening to remove a child without reasonable suspicion, the Seventh Circuit's refusal to permit relief is fully consistent with *Croft*.

II. The Seventh Circuit's Decision That a Mere Safety Plan Offer, With No Threat of Removal, Does Not Deprive Parents of the Right to Family Autonomy Is Consistent With This Court's Parental Rights Precedents.

The Class and their amici emphasize the "fundamental liberty interest of natural parents in the care, custody, and management of their child" (*Santosky v. Kramer*, 455 U.S. 745, 753 (1982)), to the virtual exclusion of the well-established rule that States have a "wide range of power for limiting parental freedom and authority in things affecting the child's welfare" (*Prince v. Massachusetts*, 321 U.S. 158, 167 (1944)). Indeed, as *Croft* explicitly held, "this liberty interest in familial integrity is limited by the *compelling* governmental interest in the protection of

children — particularly . . . from their own parents." 103 F.3d at 1125 (emphasis added).

Other than *Croft*, discussed above, the Class and its amici allege no circuit split over whether the mere offer of a safety plan, without a threat of removal, requires "reasonable suspicion of abuse or neglect," unlike removal (or the threat of removal). Instead, they fabricate a conflict between the Seventh Circuit's decision and this Court's jurisprudence on parental rights in two ways. Pet. 16-19. Both arguments fail.

First, the Class contends that all safety plan offers, standing alone, "force" separation, because such offers are rarely refused. Pet. 17. But the Class admitted that some parents in fact welcome plans, as when the alleged perpetrator is domestically violent. Pet. 91a n. 22. Furthermore, several class members testified that, at least initially, they did refuse a safety plan or later renege on it, one testified that she did not read it before signing, and some testified that they immediately retained counsel, who apparently advised them to comply. Pet. 53a-70a. Given this evidence, the Seventh Circuit correctly concluded, the Class failed to show that a safety plan offer, standing alone, "forces" separation for all class members.

For its other argument on this point — that a ruling that a safety plan may be offered without reasonable suspicion of abuse[5] conflicts with the

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[5] The Class's statistical argument on this point — that the Department determines two-thirds of Hotline reports are unfounded (Pet. 17) — is misleading. Fewer than 20% of all reports are even

Court's precedent — the Class relies on four cases in addition to *Prince*. Pet. 16-19. The Seventh Circuit's decision, however, is perfectly consistent with all of them. All five have one thing in common that makes them readily distinguishable from the instant case: every one challenged a statute that necessarily resulted in the deprivation of a right, whereas a parent always has the right to refuse a safety plan offer.

Two of the Class's authorities challenged laws governing termination of parental rights, not custody rights. *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978) (rejecting father's substantive due process challenge to law that did not require finding that he was unfit before permitting adoption of his illegitimate child); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (invalidating laws mandating payment of record preparation fees to appeal order terminating parental rights, distinguishing custody rights). *Prince* rejected a challenge to child labor laws as violating parents' fundamental right to control their children. 321 U.S. at 169. *Troxel v. Granville*, 530 U.S. 57, 67-73 (2000) (plurality opinion), invalidated a Washington visitation statute whose "broad, unlimited power" (1) subjected the mother's visitation decisions to mandatory state court review (by giving anyone the right to petition anytime for visitation), and (2) permitted courts to overturn a fit custodial parent's visitation decision, based solely on the court's best interests determination and without giving the mother' decision any weight. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), has nothing to do with parental rights — it rejected a

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investigated. Pet. 31a.

substantive due process challenge to an assisted suicide ban.

None of these cases is apposite here, given that no Illinois law (or policy) mandates that everyone being investigated must accept a safety plan. As the Seventh Circuit pointed out, parents always have the unilateral right to reject the offer, or to refuse to comply with a plan after they initially agree. Pet. 13a-14a. Indeed, the Class's own evidence demonstrated that this right was exercised: class members testified that they initially refused a safety plan, and one refused to continue complying after just two weeks. *See, e.g.*, Pet. 58a, 53a-54a, 57a.

Indeed, it is the Class's view that all safety plan offers are *per se* unconstitutional (Pet. 16) that cannot be reconciled with *Troxel*, which explicitly declined to hold that even all visitation *statutes* "violate the Due Process Clause as a *per se* matter," on the ground that adjudication on this issue is generally case-by-case (530 U.S. at 73). And if the Class were correct in its view that the mere *offer* of a safety plan is unconstitutional without reasonable suspicion of abuse, then *Troxel* surely would not have declined to decide whether a showing of harm is required for the far more intrusive act of *ordering* visitation against a parent's wishes. *Ibid.*

In sum, the Seventh Circuit's holding that a mere safety plan offer, standing alone, does not deprive parents of their liberty interest in family autonomy is fully consistent with the Class's authorities on parental rights. Indeed, these challenges to statutes that necessarily deprived parents of their rights have little relevance to the evidentiary issue of whether the

Class presented sufficient class-wide evidence to justify class-wide relief.

III. The Seventh Circuit's Decision That a Safety Plan Deprives Class Members of the Right to Family Autonomy Only if Agreement Is Obtained by "Improper Means" of Coercion Is Fully Consistent With the Court's Voluntariness Jurisprudence.

Although the Class failed to present class-wide evidence at the 22-day preliminary injunction hearing to support its claim that investigators unconstitutionally coerced members' agreement to safety plans, the Seventh Circuit explained that the Class nevertheless could prevail at trial by proving "that the state really does coerce agreement to its safety plans wrongfully by misrepresentations *or other improper means*." Pet. 19a (emphasis added). At summary judgment, the Class was forced to concede it had no evidence of legal or factual misrepresentations class-wide (Pet. 22a), and it presented no "other improper means" of class-wide coercion either. Now, the Class and its amici complain that the Seventh Circuit narrowed the definition of coercion in ways that conflict with the Court's definition. They are wrong.

A. The Seventh Circuit's Definition of Coercion — "Misrepresentations *or Other Improper Means*" — Is in Accord With the Court's Most Recent Ruling on the Issue.

Ignoring the Seventh Circuit's open-ended invitation to produce evidence of "other improper

means" of coercion, the Class zeros in on the court's use elsewhere of the term "illegal means," which it calls the court's "*singular* test" for coercion. Pet. 20 (emphasis added) (citing Pet. App. 15a). Amici similarly misread the Seventh Circuit's opinion as "basing voluntariness on a single factor", *i.e.*, misrepresentation to induce agreement. Homeless 6. But they all gravely mischaracterize the court's decision, which recognized low intelligence or lack of education as factors that could demonstrate coercion in a particular case, facts that the Class and its amici insisted should be considered, but merely rejected the notion that such individual circumstances could justify class-wide injunctive relief under Civil Rule 23 unless common to the entire Class. Pet. 3a.

The Class also ignores *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), which rejected a property owner's claim that the government tried to "blackmail" him into agreeing to give up part of his property for an easement. During the six years the property owner refused repeated demands for the easement, the government cancelled his right-of-way, charged him with permit violations, changed his permit period, denied his permit renewal application, revoked another permit, unilaterally voided a preliminary settlement agreement, and even brought criminal charges against him. *Id.* at 2593-95. These actions, which were within the government's authority, were "legitimate tactics designed to improve the Government's negotiating position" and thus not actionable, because "[e]ach may seek benefits from the others, and each may refuse to deal with the others by insisting on valuable consideration for anything in return. And as a potential contracting party, each neighbor is entitled to

drive a hard bargain." *Id.* at 2602. *Wilkie* also distinguished conduct that was within the government's authority (and thus not coercive) from trespass and other illegal conduct. *Id.* at 2603.

The Seventh Circuit's reasoning is fully consistent with *Wilkie*. It held only that the Class presented "no evidence" of improper means of coercion, such as misleading language on the safety plan form, and "no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse," adding that parents have a prompt legal remedy (the 48-hour hearing) even if a child were removed without reasonable suspicion of abuse in an individual case. Pet. 15a-16a. It also held that when an investigator has sufficient evidence to remove a child and thus the authority to do so, that investigator's truthful statement that she will exercise that right if the parents do not agree to a safety plan cannot be deemed unconstitutional. Pet. 16a.

Rather than *Wilkie*, the Class cites mostly older cases from various contexts (contracts, Fifth Amendment, Article III standing, Fourth Amendment), contending that the possibility of serious harm (here, removal) is coercive *per se*, especially if it is subjectively understood to be likely. Pet. 20-23 & n.2. Not all their amici seem to agree. Homeless 4. But the Seventh Circuit's decision does not conflict with any of these authorities. One agrees with *Wilkie* that duress arises only from a "wrongful" act or threat, and it held merely that whether a release may be set aside due to duress presents a question of fact for the jury (*Capps v. Ga. Pac. Corp.*, 453 P.2d 935, 939 (Ore. 1969)), which itself conflicts with the Class's proposed *per se* rule of coercion. The other merely held that, as

a matter of Alabama law, "improper or unjustified demands" that leave "little choice" may constitute economic duress. *Haston v. Crowson*, 808 So.2d 17, 22 (Ala. 2001).

The Class also relies on two inapposite cases on the admissibility of confessions. The consequence of a Fifth Amendment violation (*i.e.*, certain conviction, likely incarceration, perhaps the death penalty) are far different from the two possible consequences of refusing a safety plan offer that is based on less than reasonable suspicion of abuse: the child and the alleged perpetrator both remain at home, or the child is removed but returned two working days later, after the judicial hearing, if the Department cannot meet its evidentiary burden. Pet. 15a-16a. Moreover, neither of these Fifth Amendment cases conflicts with the Seventh Circuit's decision. One held only that Congress could not supersede *Miranda*'s constitutional rule for admissibility of confessions (*Dickerson v. United States*, 530 U.S. 428, 444 (2000)), while the other held, unsurprisingly, that a confession from one who was probably insane and incompetent, and interrogated for eight or nine hours in a tiny room occasionally filled with police officers and without counsel, was inadmissible (*Blackburn v. Alabama*, 361 U.S. 199, 205 (1960)).

Three of the Class's other authorities mention coercion only in the distinct context of Article III standing: *Steffel v. Thompson*, 415 U.S. 452 (1974) (holding that party had standing to bring action for declaratory relief because prosecution was genuinely threatened); *Terrace v. Thompson*, 263 U.S. 197, 216 (1923) (holding that property owner was not obliged to risk prosecution, fines, imprisonment, and loss of

property to bring facial challenge to state law); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 776 (2007) (holding that licensee had standing to seek declaratory judgment of patent invalidity without first terminating or breaching license agreement). In fact, *MedImmune* instructs the Class that its members' dilemma — choosing between abandoning parental rights or risking removal (for only two working days, unless there is reasonable suspicion of abuse) — is solved by filing a declaratory relief action (127 S. Ct. at 773), which is also available to every parent under Illinois law (735 ILCS 5/2-701 (2006)).

Still another of the Class's authorities (and of its amici (Cato 15-21; Bar Ass'n 15-17)) concerns the doctrine of unconstitutional conditions, but the Class never raised that theory below, so it is not properly before the Court now. Eugene Gressman, *et al.*, *Supreme Court Practice*, § 6.37, 506 (9th ed. 2007). Even if it were, *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 592 (1926), addressed whether a state law may impose an unconstitutional requirement as a condition precedent to enjoying a privilege, but one of the Class's other authorities *upheld* a state law permitting a party to give up a constitutional right in return for a benefit. *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972). As for *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Class mischaracterizes it as holding that timely tax payments are exacted "under duress" if the tax payer is certain of a penalty for late payments. Pet. 23. *McKesson Corp.* stated only that "*[i]f* a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund

action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful retrospective relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (emphasis added). As explained in Part IV, *infra*, Illinois provides both contemporaneous and retrospective relief for any unconstitutional deprivation in connection with safety plans.

In sum, each of the Class's authorities is perfectly consistent with the Seventh Circuit's voluntariness ruling.

B. The Class's Rule That Safety Plans Are *Per Se* Involuntary, Not the Seventh Circuit's Opinion, Is Inconsistent with this Court's Case-by-Case, "Totality of the Circumstances" Test for Voluntariness.

The Class contends that the Seventh Circuit's purported holding that "all safety plans are voluntary"[6] conflicts with the Court's voluntariness precedents. Pet. 23-25. This argument poses a threshold problem for the Class and amici: the touchstone in such cases is reasonableness, as "measured in *objective* terms by examining the totality of the circumstances" in each case, and in which the Court "ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 37-39 (1996) (emphasis

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[6] Again, this misstates the Seventh Circuit's holding, which was that the Class failed to prove that all safety plans are involuntary using factors common to all class members. Pet. 3a, 16a, 19a.

added, internal quotations omitted) (rejecting *per se* rule that every attempted interrogation be preceded by saying "[a]t this time, you legally are free to go"); *Florida v. Bostick*, 501 U.S. 429, 433 (1991) (rejecting *per se* rule that random bus searches conducted pursuant to passenger's consent are always involuntary seizures). Thus, it is the Class's rule that all safety plans are *in*voluntary *per se* (Pet. 21, 23), a rule it must advocate because it seeks relief on behalf of a class, that directly conflicts with the Court's voluntariness precedent.

Some amici make a related but distinct error, insisting that "[w]hether an individual voluntarily consents is basically a question of *that individual*'s intent or mental state." Homeless 11, 16. This subjective inquiry, however, not only conflicts with the Fourth Amendment's objective one but also would be impossible to litigate class-wide. As for other amici's view that "well-documented scientific research regarding human decision-making" "should play an integral role" in coercion analysis (Psychoanalytic Ass'n 5-17), the Class attempted to present expert testimony on coercion (Tr. 990-1118), but the district court gave little credence to that testimony (Tr. 2050), and does not rely on it in its decision. Indeed, neither the Class nor the amici point to a single decision from any court relying on scientific research to create a *per se* rule on voluntariness.

If anything, the arguments of the amici illustrate that an action for class-wide injunctive relief is singularly inappropriate for this coercion claim. They emphasize the wide variety of possible circumstances for each parent (Psychoanalytic Ass'n 6-7) and "factors unique to" particular parents (Homeless 8). The

Seventh Circuit invited the Class to marshal evidence of improper means of obtaining consent class-wide, and the Class failed to do so — its counsel admitted that the Class had no evidence of systematic misrepresentations when threatening removal, and the Class's attempts to claim other means of coercion failed for lack of proof that they existed class-wide. Likewise, the Class's *per se* rule would deem all safety plan offers coercive, even when counsel advises parents to agree and to comply (as here), or a parent's subjective "actual understanding" is completely unreasonable, or one parent actually wants the alleged perpetrator out of the home and therefore favors a safety plan, as the Class admitted was true of some class members (Pet. 91a n.22). Thus, as pointed out by the Seventh Circuit (Pet. 3a) *and* as revealed by class members' own testimony (Pet. 53a-70a) and illustrated by amici's arguments, a class action is simply an extraordinarily poor vehicle for the Class's coercion claim. And the Seventh Circuit's coercion ruling is record-bound (rather than based on a "presumption" of voluntariness (Psychoanalytic Ass'n 3): the Class presented no evidence that agreement was coerced by the form alone, given the truthful language about the *possible* consequences of refusal (Pet. 18a-19a), it conceded it had no evidence of class-wide threats of removal unsupported by sufficient evidence to remove the child (Pet. 3a, 19a), and it made no attempt to present evidence of "other improper means" of class-wide coercion.

The Seventh Circuit's decision is also fully consistent with this Court's Fourth Amendment jurisprudence. In fact, the consent form tells parents that agreement is voluntary (Pet. 92a) even though

Robinette indicates that parents need not be told "you are legally free to refuse" a safety plan offer (519 U.S. at 37-39), and even though *Bostick* reiterated that officers may ask potentially incriminating questions, and even request consent to search luggage, with no basis at all for suspecting a particular individual, so long as they do not "convey the message that compliance with their requests is required" (501 U.S. at 435, 439). The Seventh Circuit's conclusion that a safety plan form that accurately conveys the message that compliance is voluntary and that refusal "may" result in removal does not, standing alone, vitiate consent (Pet. 16a) is thus consistent with *Bostick* and *Robinette*, unlike the Class's proposed *per se* rule.

The Class also overstates its other authorities on coercion, none of which is apposite here. Pet. 24. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), does *not* stand for the proposition that "a threat of serious harm may be a 'circumstance' that, *by itself*, vitiates the voluntariness of agreement," as the Class contends. Pet. 24 (emphasis added). In fact, *Schneckloth* stands for the opposite proposition: no single criterion is controlling when determining voluntariness. 412 U.S. at 224-26. And critically, *Schneckloth* distinguished between consent by those who are in their "own familiar territory," as parents likely are when a safety plan is discussed, and consent when one is in custody, which is inherently coercive and thus requires a different test for consent. *Id.* at 248-49. *D.H. Overmeyer Co.* rejected a due process challenge to Ohio's confession-of-judgment statute, which required waiving a constitutional right in return for a benefit, but commented that unspecified "legal consequences may ensue" under certain conditions, none of which

exists here. 405 U.S. at 188. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), held only that a confession was involuntary because, among other things, the arrestee was told that state aid for her infant children would be cut off and her children taken from her while she spent ten years in prison, while encircled in her apartment by three police officers and a twice-convicted felon who had "set her up." None of these cases conflicts with the Seventh Circuit's decision that a mere safety plan offer, standing alone and containing truthful language about the possible consequences of refusal, is not *per se* coercive.

In the end, even if *some* class members' agreement were in fact unconstitutionally coerced under the totality of their own individual circumstances, that would at best entitle such individuals to relief. And although only very few parties appear to have brought such claims, those that have were unsuccessful. The DeLaFonts' suit was rejected by a jury (*DeLaFont*, No. 02-5448 (N.D. Ill. Dec. 1, 2005)), and the smattering of similar individual suits brought around the country in the last dozen years likewise failed (*see, e.g.*, *Smith v. Williams-Ash*, ___ F.3d ___, 2008 WL 782453 (6th Cir., March 26, 2008); *Terry v. Richardson*, 346 F.3d 781 (7th Cir. 2003); *Gottlieb v. County of Orange*, 84 F.3d 511 (9th Cir. 1996)).

IV. The Seventh Circuit's Holding That No Hearing Is Required Absent Evidence of a Deprivation of a Constitutionally Protected Interest Is Consistent With the Court's Procedural Due Process Jurisprudence.

The Class admits, as it must, that the Seventh Circuit correctly held that a hearing is required only for the deprivation of a constitutionally protected right (Pet. 26), but then contends that the Seventh Circuit purportedly misstated the Class's procedural argument, which they say sought only post- (not pre-) deprivation hearings to contest safety plans (Pet. 26-28). Whether the Seventh Circuit misinterpreted the Class's litigation position is, of course, not a question warranting this Court's review. But the Class's argument appears disingenuous in any event — the district court later *ordered* review upon request within ten working days (Pet. 27a), yet the Class was dissatisfied with this result. The district court's later order (Pet. 26a-28a), which required the Department to incorporate certain procedural safeguards after the preliminary injunction hearing, is ignored by amici too. See, e.g., Psychoanalytic 22 (stating that parents forfeit the right to challenge the safety plan by agreeing to it); Cato 9-21 (stating that no procedure exists for contesting safety plans); Fathers 22-24. Meanwhile, other amici press for a pre-deprivation hearing. Bar Ass'n. 2.

The Class and its amici demand that acceptance of a safety plan offer, standing alone, requires the same "robust set of procedural rights" for ensuring that acceptance of a plea agreement is voluntary. Pet. 27-28; Bar Assn. 4, 18-21. As indicated above, however, to

forever relinquish the right to a trial by one's peers is fundamentally different from agreeing to a safety plan: a parent may unilaterally refuse or withdraw acceptance of a safety plan at any time. That no hearing is needed to determine whether acceptance of the plan is voluntary was handily demonstrated by the Class's own evidence: one class member unilaterally stopped complying with her safety plan after two weeks (Pet. 57a), and the Department never claimed that she waived her right to do so by agreeing to the plan initially. This was compelling evidence that no hearing is required to determine whether a safety plan is voluntary: when parents no longer agree, they have the right to just stop complying (or sue for declaratory relief, as *MedImmune* teaches). And although the Class finds significant that respondent did not present evidence of parents refusing safety plans, respondent had no evidentiary burden here, unlike the Class, which presented no evidence that anyone who did agree at one time but reneged was told they had waived their right to challenge the safety plan by agreeing to it in the first place.

Perhaps the larger problem with the Class's procedural due process argument is its apparent belief that the Department is the only source for the hearing it demands. See also Fathers 22-24. In fact, as the Seventh Circuit instructed in *Terry*, Illinois law already provides procedures to challenge an investigator's authority to limit or prohibit a parent's contact with a child during an investigation. 346 F.3d at 787. These procedural vehicles include actions for mandamus relief (735 ILCS 5/14-101 (2006)) or declaratory judgment (735 ILCS 5/2-701 (2006)). And although the Class and its amici seem to believe that

the Department itself had to provide (or initiate) the hearing, they offer no support for that view, which appears to conflict with *MedImmune* (127 S. Ct. at 773) and *Gottlieb* (84 F.3d at 521) in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MARY ELLEN MARGARET WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

*Counsel of Record

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APPENDIX

What You Need to Know about a Child Abuse or Neglect Investigation

www.state.il.us/dcfs

Introduction

The purpose of this booklet is to provide information concerning the Department of Children and Family Services (DCFS), the Child Abuse Hotline and the child abuse and neglect investigation process. DCFS is mandated by Illinois law to maintain a 24 hour hotline to receive reports from the public and mandated professionals concerning alleged incidents of child abuse and neglect involving Illinois children. Reports taken at the hotline are forwarded to a Department field office nearest the alleged child's home for investigation.

The Department's focus during the course of all child abuse and neglect investigations is the safety of the child victims of the alleged child abuse or neglect. Child abuse and neglect investigations are initiated within 24-hours after the report is taken at the hotline by initiating contact with the alleged child victims or observation of the child's environment if the allegation is one of inadequate shelter or environmental neglect.

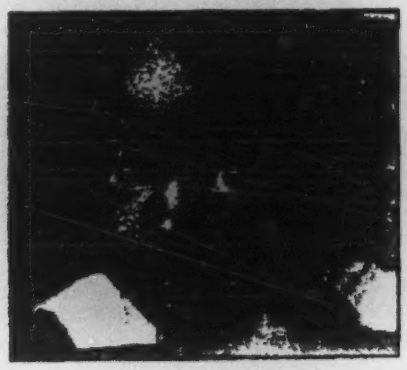
When a child is believed to be at immediate danger of harm, the investigation will be initiated without delay. DCFS has up to 60 days to complete an investigation and make a final determination. However, 30-day extensions can be granted for good cause. The Department notifies the alleged

perpetrator and the child's caretakers in writing of the Department's final finding within 10 days after the final determination is entered into the State Central Register. If the allegation is indicated, the notification also provides the perpetrator with instructions on how to request an appeal and receive an administrative hearing before an impartial Administrative Law Judge. The DCFS Director will issue a final administrative decision within 90 days of the receipt of a timely and sufficient request for an appeal, unless extended by an action of the

person filing the appeal or a stay pending a final judicial determination of a criminal or juvenile court proceeding based upon the same set of facts.

These topics are discussed in greater detail throughout this booklet. Information concerning child abuse and

neglect investigations and administrative appeals can be accessed through the Department's web site, www.state.il.us/dcfs.



Overview of Child Abuse and Neglect Investigations

What is the Child Abuse Hotline?

Child welfare professionals staff the Department's child abuse hotline 24 hours per day, seven days per week, 365 days per year to receive and assess reported information of suspected child abuse and neglect. Information meeting the criteria for a report of abuse or neglect is taken and forwarded to the appropriate Department field office for investigation. The toll free number for the hotline is 1-800-25ABUSE (252-2873).

Who can call the Child Abuse Hotline?

Anyone can make a report to the DCFS child abuse

hotline. However, certain professionals, such as doctors, nurses, teachers, childcare center staff and social workers are mandated reporters. Mandated reporters are required to call the child abuse hotline and make a report if they have reason to believe that a child known to them in their professional capacity may be abused or neglected. Mandated reporters may suffer severe penalties, such as the loss of a professional license or criminal charges, if they fail to report suspected child abuse or neglect.

What happens during the investigation?

After the child welfare professional at the hotline determines there is enough information to take a report, the case is assigned to a trained investigative specialist. The investigative specialist is required by law to initiate the report by seeing the alleged child victims within 24 hours from the time the report is received. If the allegation is one of inadequate shelter or environmental neglect, the investigative specialist will initiate the report by viewing the child's living environment. During this initial contact and throughout the investigation, the investigative specialist's primary concern is the immediate safety of the alleged

child victims. If necessary, the investigative specialist will develop a safety plan with the family to maintain the safety of the children during the course of the child abuse and neglect investigation

The investigative specialist will interview the alleged child victims and other children in the household, alleged perpetrators, parents, caretakers, other members of the household, extended family members and various other professionals, depending on the specific allegation of abuse or neglect. If you or members of your family are involved in an investigation, you should provide full and complete information to the investigative specialist who will ask you and your family members questions about the alleged incident and the home environment. You and your family members should provide the investigative specialist with the names and contact information of any witnesses, neighbors, friends, family members, relatives or professionals who has first hand knowledge of the alleged incident and who you wish the investigative specialist to contact during the

investigation.

State law requires that the investigative specialist notify the police and the local State's Attorney of all serious allegations of child abuse and neglect, such as those that allege serious physical injury or sexual abuse to a child. The police and the Department may conduct a joint investigation, or the police may conduct their own investigation. The investigative specialist may also need to contact the police if individuals refuse to cooperate with the investigation.

The investigative specialist is required to gather all available information during the course of the investigation. This includes information tending to show that a person is responsible for committing child abuse and/or neglect as well as information tending to show that person is not responsible for committing child abuse and/or neglect. Once all of the available information has been gathered, the investigative specialist, in conjunction with a supervisor, will make a final finding in the case. There are two final finding decisions that can result from an investigation. A report can be "unfounded" or "indicated." When a report is unfounded, it means that the investigative specialist did not find credible evidence that a child was abused or neglect. When a report is indicated, it means that the investigative specialist found credible evidence that a child was abused or neglected. "Credible evidence" means that the available facts when viewed in light of surrounding circumstances would cause a reasonable person to believe that a child was abused or neglected.

How long does an investigation last?

Under state law, the Department has 60 days to complete a child abuse and neglect investigation. Most child abuse and neglect investigations are completed within 30 days. The Department may seek an extension of the 60 day requirement for good cause. Examples of good cause include a pending police investigation or obtaining reports from medical professionals.

How do I find out the results of the investigation?

You will be notified in writing by the Department of the final finding of the Department's investigation and the investigative specialist will contact you in person to advise you of the results of the investigation and the reason for the final finding. It is important that you keep the ir vestigative specialist informed of your current home address and other personal contact information so that the investigative specialist can make sure that the most up to date information is contained in the investigation file.

The final findings of child abuse and neglect investigations are maintained on the Department's State Central Register. The State Central Register is a confidential list of persons who have been found to be indicated perpetrators of child abuse and/or neglect. Information maintained on the Department's State Central Register is confidential and not open to the general public. However, state law requires that various employers such as day care centers, some

schools and other facilities where people work directly with children, conduct a background check on potential employees or volunteers to determine if the person has been indicated for child abuse and/or neglect as part of the employment process.

If the investigation is unfounded, the Department's State Central Register will maintain the information for a period of time from 60 days up to three years, depending on the nature of the allegation. After the designated time period, the record of the investigation will be removed from the State Central Register. A person who has been the subject of an unfounded report may request in writing that the Department retain a record of the investigation for harassment purposes.

If the investigation is indicated, the report will be maintained on the Department's State Central Register for a period of time from five years to 50 years, depending on the specific allegation that is indicated.

What can I do if I have been indicated for child abuse or neglect?

Persons who have been indicted for child abuse and/or neglect have certain rights. These rights include:

1. The right to receive a copy of the investigative file, absent certain information that the Department is prohibited from releasing by law
2. The right to request an administrative appeal hearing of the indicated finding, which includes the right to a hearing at which the indicated

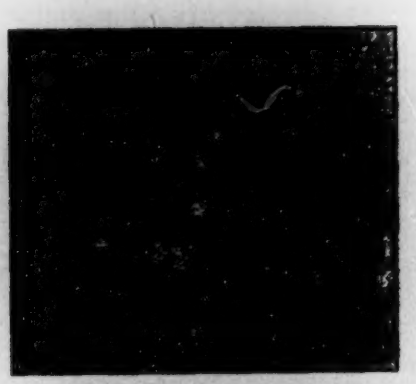
perpetrator and the Department can present testimony and other evidence before a neutral Administrative Law Judge who make a recommended finding to the DCFS Director

3. The right to see judicial review of the Director's final administrative decision after an administrative appeal hearing

Can DCFS remove my children from my care during an investigation?

The Department's main focus during the investigative process is to assure the safety and protection of children. The Department attempts to assure the safety of children in a variety of ways during the investigation. If the investigative specialist determines that children are unsafe but may be maintained in their home with a safety plan, the investigation specialist will explain the reason for the safety plan and develop a safety plan with the family that can keep children safe during the investigation.

State law permits an investigative specialist to take temporary protective custody of a child without the consent of the person responsible for the child's welfare only if there is reason to believe that the child is in immediate danger and there is not time to file a petition in court. Before a child is taken into protective custody, the investigative specialist will consider whether there are other means available, such as a safety plan or assistance in locating and securing housing, which could avoid the need for the child to be removed from the home. A hearing before a judge will be held within 48 hours, excluding weekends and holidays, of a child being taken into protective custody.



What is a safety plan?

During the course of a child abuse and neglect investigation, the Department is mandated by law to assess the safety of any alleged child victim and other potential victims and to take appropriate steps to insure the safety of those children. Department staff will work with the children's caretakers and other family members to develop strategies to maintain the safety of children during the course of an investigation. One method by which the Department attempts to insure the safety of children is to develop a safety plan with the children's caretakers and other family members. A safety plan is a temporary, short-term plan designed to control serious and immediate threats to children's safety. Safety plans can take a variety of forms and are developed with the input and voluntary consent of the children's caretakers and other family members. During the course of the child abuse and neglect investigation, the children's safety will continually be reassessed as will the continued need for the safety plan.

After the investigative specialist has completed a safety assessment on the alleged child victim and any other potential victims, they will discuss the need for

any safety interventions with the children's caretakers and/or family members. The investigation specialist will provide the children's caretakers with a copy of the completed safety assessment and will also explain the reasons they believe the safety plan is necessary. The investigative specialist will also discuss the need for safety interventions with the children's caretakers and other family members.

Safety plans can take a variety of forms and the family's input is essential in developing a plan. Safety plans can include asking a caretaker and/or children to live in another location during the course of an investigation, asking a caretaker and/or children to have supervised contact with children or asking another family member to move into the home during the investigation to supervise contact with the children. The specific requirements of each safety plan will depend on the individual circumstances of the investigation and the specific needs and circumstances of the family situation. The investigative specialist will provide the family with a written copy of the safety plan. The investigative specialist will monitor and reassess the safety issues on a weekly basis.

What will happen if my child is removed from my care?

Whenever a child is taken into temporary protective custody, the investigative specialist is required to notify the child's parents of the reasons for the child's removal from their home. Within 48 hours of the child being taken into temporary protective custody,

a shelter care hearing or temporary custody hearing is held in juvenile court. The purpose of the hearing is for a judge to determine whether the child is in need of protection. Parents will be provided with written notification of the date and time of the scheduled court hearing and should make every attempt to attend the court hearing. The judge will listen to the testimony at the hearing and make a decision whether to return the child to his or her parents or to order the Depart-ment to serve as the child's temporary custodian. The Department will attempt to provide services to the child and the child's parents to address the reasons that the case was brought into court and any other family issues.

What happens if the court does not return my children to my care at the first hearing?

In the event that the judge orders the Department to

serve as the children's guardian, the Department will assign the family a caseworker who will attempt to address the issues that brought the family to the Department's and the court's attention as well as any other family issues. The caseworker will work with the family to provide services to address the family's needs and the court will schedule court hearings to hear about the family's progress. Further information regarding the court process will be provided in the even that a child is removed from their parents and/or caretaker's physical custody.

Can I found out who called in the report to the hotline?

By law, DCFS cannot release the name of the person who made the report to the hotline or the names of other persons who cooperated in the investigation. Limited exceptions are described in the Department's administrative rules, which are contained on the DCFS Web site.

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